UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:

PAN AMERICAN HOSPITAL CORPORATION and PAN AMERICAN MEDICAL CENTERS, INC.	Chapter 11 Case No. 04-11819-BKC-AJC 04-11820-BKC-AJC (Jointly administered)
Debtors.	

_____/

ORDER DENYING DEBTOR'S MOTION FOR PROTECTIVE ORDER IN CONNECTION WITH NOTICES OF RULE 2004 EXAMINATIONS *DUCES TECUM*

THE MATTER came before the Court for hearing on February 9, 2005 in Miami, Florida, upon the Debtor's *Motion for Protective Order in Connection with Notices of Rule 2004 Examinations Duces Tecum* (the "Protection Motion") (C.P. # 505), the *Response of Service Employees International Union, AFL-CIO, CLC to Debtors' Motion for Protective Order in Connection with Notices of Rule 2004 Examinations Duces Tecum and for Award of Sanctions* (the "Response") (C.P #533) and the *Reply to Response of Service Employees International Union, AFL-CIO, CLC to Debtors' Motion for Protective Order in Connection with Notices of Rule 2004 Examinations Duces Tecum and for Award of Sanctions* (the "Reply") (C.P. # 548). The Court having reviewed the Protection Motion, the Response and the Reply, and having considered the argument of counsel and being otherwise fully advised in the premises does enter this opinion.

The Protection Motion, Response and Reply call upon the Court to determine whether it is appropriate for Service Employees International Union, AFL-CIO, CLC ("SEIU") to examine Lourdes Sanjenis, Modesto Mora and Vicente Sanchez (the "Examinees"),[1] pursuant to Fed. R. Bankr. P. 2004 (the "2004 Examinations"). Rule 2004 provides in pertinent part:

[1] Ms. Sanjenis and Dr. Mora are members of the Debtor's Board of Directors. Mr. Sanchez is the Debtor's CEO.

> (a) Examination on Motion. On Motion of any party in interest, the court may order the examination of any entity.
>
> (b) Scope of Examination. The examination of an entity under this rule or of the debtor under section 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate or to the debtor's right to a discharge.

Local Rule 2004-1(A) obviates the need for an Order as a condition precedent to the commencement of a Rule 2004 examination. In the instant case, through its Protection Motion, filed pursuant to Local Rule 2004-1(C), the 2004 Examinations of the Examinees were stayed pending the determination by this Court as to the propriety of the examinations.

The Debtor has raised various grounds for why the 2004 Examinations should not proceed. This Court herein addresses the grounds raised by the Debtor and concludes that such grounds are insufficient to prevent the SEIU from conducting the 2004 Examination.

A. Standing of SEIU as a "Party in Interest"

There is no question that SEIU is a "party-in-interest" in this case. In this Court's *Order Denying Debtor-In-Possession's Motion: (1) To Strike Objection of SEIU to Interim Fee Application of Fisher & Phillips and (2) Deny Standing to SEIU* (the "Standing Order") (C.P. # 321), the Court specifically held that the SEIU had standing in the Debtor's bankruptcy case, based, in part, on the SEIU's practical stake in the outcome.

As a "party in interest" under 11 U.S.C. Section 1109(b), the SEIU has standing and maintains the opportunity to appear and be heard in all aspects of the instant case. Section 1109(b) provides that:

> A party in interest [SEIU] . . . may raise and may appear and be heard on any issue in a case under this chapter.

Such standing, both under the Standing Order and section 1109(b) of the Bankruptcy

Code, affords SEIU the right to utilize Fed. R. Bankr. P. 2004(a), provided the 2004 Examinations contemplated by the SEIU fall within the confines of the rule.

B. Scope of Rule 2004

Examinations under Rule 2004 are by their nature extremely broad, and are allowed for the "purpose of discovering assets and unearthing frauds." *See In re GHR Energy Corp.*, 33 B.R. 451, 453 (Bankr. D. Mass. 1983). The scope of examinations under Rule 2004 is framed by the plain language of the rule:

> (b) Scope of Examination. The examination of an entity under this rule or of the debtor under section 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate or to the debtor's right to a discharge.

Numerous courts have acknowledged the rule's broad scope, holding that a Rule 2004 examination can be legitimately in the nature of a "fishing expedition." *See In the Matter of M4 Enterprises, Inc.*, 190 B.R. 471, 474 (Bankr. N.D. Ga. 1995). However, examinations under Rule 2004 do have limits, as they may not be used for "purposes of harassment" and "cannot stray into matters which are not relevant to the basic inquiry." *See In re Mittco, Inc.*, 44 B.R. 35, 36 (Bankr. E.D. Wis. 1984). Thus, as long as the questions posed by the SEIU at the 2004 Examinations do not exceed the boundaries enunciated in the rule, the SEIU is entitled to conduct the 2004 Examinations.

The Debtor has requested the Court limit the scope of the examinations to the classification of documents sought in the notice *duces tecum*. However, the Court sees no need to so limit the examinations. Any party in interest that has raised legitimate concerns about the competence of a debtor's management may take discovery to prove or augment its case. The fact

that SEIU sought only certain categories of documents[2] does not frame the available scope of its inquiry or preclude it from probing into legitimate areas contemplated by Fed.R.Bankr.P. 2004. Thus, as long as the SEIU limits its 2004 Examinations to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate or to the debtor's right to a discharge, the Court believes SEIU is entitled to conduct the 2004 Examinations.

C. Availability of Rule 2004 When Contested Matters Are Pending

There is presently pending the *Motion of Service Employees International Union, AFL-CIO, CLC for Appointment of a Chapter 11 Trustee* (the "Trustee Motion") (C.P. # 431). The Trustee Motion challenges the business judgment of the Debtor's management for its labor practices and its decision-making in furtherance of those practices. The Debtor has suggested that with the pendency of the Trustee Motion, the so-called "pending proceeding rule" precludes the SEIU from taking examinations of Debtor's management under Rule 2004. Instead, the Debtor contends that SEIU is limited to the use of Fed. R. Bankr. P. 7030. The Debtor contends that it would be denied important procedural safeguards if the examinations were to proceed under Rule 2004, including "the right to object to improper and unfair questions in the course of

[2] The duces tecum sought documents related to the following:

1. Any and all documents related to any and all terminations, firing or dismissals of any and all employees who are representatives of any SEIU collective bargaining units.

2. Any and all documents related to, or in anyway connected with, the South Florida Physicians Group, including but not limited to any and all contracts, agreements and termination notices.

3. Any and all documents related to, or in any way connected with, the decision by you and the Hospital's board of directors to reject the contract proposal presented by Medical (sic) Healthcare Plans, Inc.

the examination" and the right to make relevancy objections. Transcript of Feb. 9, 2005 hearing at p. 38-39.

The Court understands the Debtor's argument and is aware that courts have held that "[i]f a contested matter or adversary proceeding is pending, Rule 2004 should not be used, but rather the various discovery provisions of the Federal Rules of Civil Procedure should apply." *See In re French*, 145 B.R. 991, 992 (Bankr. D. S.D. 1992). However, blind invocation of the "prior proceeding rule" elevates form over substance. Based upon the current status of the Trustee Motion, the Court believes it is appropriate for SEIU to conduct the examinations under Rule 2004.

In the instant case, the Trustee Motion has been abated, raising the issue of whether an abated contested matter is in fact "presently pending" for purposes of the so-called "pending proceeding rule" which would prevent the SEIU from commencing discovery under Rule 2004. The Court believes that, under the circumstances, the abated Trustee Motion is not a pending proceeding as contemplated by the "pending proceeding rule". Although the Trustee Motion has not been officially withdrawn by the SEIU, and the SEIU could decide to pursue the Trustee Motion at any time, in its present posture it is not before the Court for consideration and therefore not considered to be a "pending proceeding".

Furthermore, the Court does not believe the examinations are preempted by the National Labor Relations Act ("NLRA") and the jurisdiction of the National Labor Relations Board. The NLRA "is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce." *See Nash v. Florida Indus. Comm'n,* 389 U.S. 235, 238 (1967). "[I]n passing the NLRA, Congress largely displaced state regulation of industrial relations." *See Wisconsin Dep't of Indus., Labor and Human Relations v. Gould, Inc.*, 475 U.S.

282, 290 (1986) (noting that Congressional purpose is the "ultimate touchstone" of preemption analysis). It is well settled that the NLRB has primary jurisdiction over disputes involving unfair labor practices and the insulation of "protected acts." *See* 29 U.S.C. § 158.

The NLRB's primary jurisdiction was articulated by the Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). In *Garmon*, the Supreme Court held:

> "[w]hen an activity is arguably subject to §7 or § 8 of the Act [the NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

However, the Supreme Court provided two exceptions to the preemption doctrine:

> "[d]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. Or where the regulated conduct touched the interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.* at 779 (citations omitted)

In addition to the preemption exceptions set forth in *Garmon*, the Supreme Court in *Farmer v. Carpenters*, 430 U.S. 290 (1977) clarified the application of "*Garmon* preemption" stating:

> "[o]ur cases indicate …that inflexible application of the doctrine is to be avoided, especially where the state has a substantial interest in regulation of the conduct at issue and the state's interest is one that does not threaten under interference with the federal regulatory scheme."

The Supreme Court explained that the preemption doctrine would not be applied:

> "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that

judicial supervision will not disserve the interests promoted by the federal labor statutes." *Id.* at 296-297.

Certainly, examinations conducted under the Federal Rules of Civil Procedure, with all of their attendant protections, are structured and administered in a way that makes it safe to presume that federal labor statutes will not be disserved. So too, examinations under the Federal Rules of Bankruptcy Procedure would not disserve the structure of the labor laws of the country, and the Debtor has failed to persuade the Court that they would.

Upon review of the *Garmon* and *Farmer* decisions, the Supreme Court in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 188 (1978) further clarified the parameters of the preemption doctrine and noted that "the Court has refused to apply the *Garmon* guidelines in a literal, mechanical fashion." Explaining whether preemption applies, the Supreme Court held that if the alleged conduct is arguably prohibited under the National Labor Relations Act, then the critical inquiry in determining preemption is "whether the controversy presented to the [court] is identical to…or different from" that which the NLRB could have considered.

Under the foregoing precedent, it must therefore be established that the content of the 2004 Examinations is peripheral to the concerns of labor law and the issues raised by the 2004 Examinations are not identical to those which the NLRB could have considered. Here, the Debtors contend that the 2004 Examinations seek to inject controversies into the instant case identical to the ones that could have been presented by the SEIU to the NLRB. This Court is of the opinion that while there may be some overlap in the issues presented, the issues within the scope of the 2004 Examinations are not "identical" to the issues that could have been presented before the NLRB.

In the instant case, the SEIU is seeking to obtain discovery pursuant to its status as a party in interest in the Debtor's bankruptcy case. SEIU has made no secret of its challenges to the business judgment of Debtor's management. This has been expressed in the several objections to the fee applications filed by Debtor's labor counsel, the proactive role that SEIU has played in this case both prior and subsequent to the constitution of the Committee and the analysis that SEIU has done regarding the post-petition financial performance of the Debtors. All of these are outside of – or peripheral to – the strict structure of the NLRA and are soundly within the jurisdiction of this Court. The fact that there may be some peripheral overlap of issues does not prohibit SEIU from exercising its procedural rights in this bankruptcy case, nor does it deprive this Court of its jurisdiction to oversee the administration of the estate. The acts and conduct that this Debtor's management engages in with regard to its employees are undoubtedly "matters which may affect the administration" of the estate, as such matters have an extraordinary impact upon Debtor's business operations which are dependent upon the employees for its forward-going success.

Conclusion

In summary, the Court finds that while there may be some overlap between the issues addressed in the SEIU's 2004 Examinations and issues within the jurisdiction of the NLRB, the issues are not identical. Based upon the Supreme Court's decision in *Sears,* this Court determines that the preemption argument raised in the Protection Motion should be rejected. Furthermore, because the Trustee Motion is currently in abeyance, the Court finds the "pending proceeding rule" inapplicable. Accordingly, it is

ORDERED AND ADJUDGED that the Debtor's *Motion for Protective Order in Connection with Notices of Rule 2004 Examinations Duces Tecum* is DENIED, and the 2004

Examinations may proceed. However, in taking the examination of Dr. Mora and Dr. Sanjenis, the inquiry of SEIU should be limited to their involvement in board decisions, policy, management, operations and any personal financial involvement that they may have in entities transacting business with the hospital subsequent to March 5, 2004, the petition date. Any other inquiries into the personal finances of Dr. Mora and Dr. Sanjenis or other matters of a personal nature are beyond the permissible scope of the examinations.

ORDERED in the Southern District of Florida on February 25, 2005.

A. JAY CRISTOL
U.S. BANKRUPTCY COURT